DEC 26 1973

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S OPPOSITION MEMORANDUM

RALPH J. SCHWARZ, JR.
22 East 40th Street
New York, N. Y. 10016

JOHN POWERS CROWLEY
CROWLEY, NASH & SHEA
53 West Jackson Boulevard
Chicago, Ill. 60604
Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
I—The Seventh Circuit memo order of July 5, 1973 on its face does not reconsider indictment sufficiency or *Miller* issues	3
II—Petitioner was indicted and convicted on basis of improper constitutional standards; neither test (b) nor test (c) may be applied retroactively	3
A. Vagueness of Statute as Applied and New Miller Test (b)	3
B. Retroactivity	7
C. The "Utterly Without" Test, Vagueness and Retroactivity	9
III—The exclusion of all testimony for defendant on community standards was due process error	10
IV—The indictment and conviction predicated on national standards furnished no ascertainable standard of guilt	11
Conclusion	15
Appendix F—Obscenity Tests Charge to Jury	16

TABLE OF CASES

Ashton v. *Kentucky*, 384 U.S. 195 (1966)	8
Bouie v. *City of Columbia*, 378 U.S. 347 (1964)	8
Detco, Inc. v. *McCann*, No. 72-C-121, E.D. Wisc., Oct. 19, 1973 (3-judge ct.)	6

PAGE

Douglas v. *Buder*, —— U.S. ——, 37 L.Ed.2d 52 (1973) 8

Ginzburg v. *United States*, 383 U.S. 463 (1966) .....

Hamling v. *United States*, No. 72-1892, 9th Cir., June 7, 1973 ..... 2, 3

Herndon v. *Lowry*, 301 U.S. 242 (1937) 5

Hoyt v. *Minnesota*, 399 U.S. 524 (1970) 14

Jacobellis v. *Ohio*, 378 U.S. 184 (1964) 14

Manual Enterprises, Inc. v. *Day*, 370 U.S. 478 (1962) 2, 4, 8, 12, 13

Memoirs v. *Massachusetts*, 383 U.S. 413 (1966) ...1, 4, 5, 7, 9, 12

Miller v. *California*, —— U.S. ——, 37 L.Ed. 2d 419 (1973) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 5

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 5

Pierce v. *United States*, 314 U.S. 306 (1941) 8

Rabe v. *Washington*, 405 U.S. 313 (1972) 8

Redrup v. *New York*, 386 U.S. 767 (1967) 5

Roth v. *United States*, 354 U.S. 476 (1957) 1, 4, 5, 7, 8, 9, 12

Shuttlesworth v. *Birmingham*, 394 U. S. 147 (1969) .. 8

Smith v. *California*, 361 U.S. 147 (1959) 10

Stroud v. *Indiana*, —— Ind. ——, 300 N.E.2d 100 (Ind. Sup. Ct. Aug. 21, 1973), remanded —— U.S. ——, 37 L.Ed. 2d 1025 (June 25, 1973), vacating and remanding 273 N.E.2d 842 (Ind. Sup. Ct. 1971) ... 7

PAGE

United States v. *Carter*, No. CR. 72-207, W.D.Tenn., Dec. 12, 1973 ..... 9, 12

United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 5

United States v. *Friedman*, No. 72-1143-44, 10th Cir., Dec. 11, 1973 ..... 2, 12

United States v. *Henson*, No. 73-2063, 9th Cir., Oct. 5, 1973 7

United States v. *Lang*, 361 F.Supp. 380 (C.D.Cal. 1973) 10

United States v. *Miller*, No. 71-1850, 9th Cir., Aug. 31, 1973 11

United States v. *One Reel of Film*, 481 F.2d 206 (1st Cir. July 1973) 13

United States v. *Orito*, —— U.S. ——, 37 L.Ed.2d 513 (1973) 3

United States v. *Thevis*, No. 71-2614, 5th Cir., Sept. 12, 1973 .....3, 4, 12

United States v. *12 200-Ft. Reels*, —— U.S. ——, 37 L.Ed.2d 500 (1973) 3, 6, 11

Statutes:

18 USC 1462 .....4, 7, 9

18 USC 1465 9

Proposed Statute; Congressional Bill S-1 93rd Congress—relevant community is place of dissemination 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S OPPOSITION MEMORANDUM

Preliminary Statement

Petitioner replies to the government's opposition memorandum. Petitioner was indicted and convicted under a statute too vague as applied and which furnished no ascertainable standards of guilt (and sentenced to five years on a one-count indictment). The jury charge was a straight *Roth-Memoirs** charge under the old three-fold test (Tr. 636-638).

---

* *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). The jury charge is reproduced in Appendix F annexed.

Government counsel graciously forwarded government's opposition memorandum in *Hamling* v. *United States* (on writ petition to the Ninth Circuit No. 73-507). The government stated their position in this case would be the same as in *Hamling*, except the government would also deal with the exclusion of all community standards proof (Sians Petition Point III), which is a separate issue in this case.**

Manual Enterprises, Inc. v. *Day*, 370 U.S. 478, 488 (1962), held that for community standards purposes there "must first be decided the relevant community" (Point IV, *infra*), and that in a federal prosecution the relevant community standard was a national one. The government says no objection was taken to the charge re community standards. But this case was tried as a federal prosecution. Unlike *Miller* v. *California*, —— U.S. ——, 37 L.Ed.2d 419, 435 (1973), no one in this federal case proceeded on the basis that the relevant community was a state or local one, but rather that the relevant community was a national one. Hence, of course, no objection was taken to the charge. However, this point was raised on the amendment to the petition for rehearing.

The bottom line is that national standards do *not* furnish an ascertainable standard of guilt against which to measure community standards pre-*Miller*, or post-*Miller*. Hence, the conviction may not stand. (Point IV, *infra*.) This is supported, *inter alia*, by the December 11, 1973 opinion of the Tenth Circuit, *United States* v. *Friedman* (Nos. 72-1143-44, 10th Cir., Dec. 11, 1973).

While we submit the Seventh Circuit is wrong, we note for certiorari purposes that decisions of federal (and state) courts are in conflict with those of the Seventh Circuit. For clarity we follow the sequence of the Sians petition.

** Government counsel also courteously forwarded their draft copy, but mails being what they are, we had to start the preparation.

I

The Seventh Circuit memo order of July 5, 1973 on its face does not reconsider indictment sufficiency or *Miller* issues.

The July 5, 1973 memorandum order of the Seventh Circuit which affirmed the judgment of Conviction (Appendix B to Petition) on the face of it does not reflect a "reconsideration of the sufficiency of the indictment in light of *Miller*," *United States* v. *Orito*, —— U.S. ——, 37 L.Ed.2d 513, 519 (1973), or any *Miller* v. *California* issues, —— U.S. ——, 37 L.Ed.2d 419 (1973).

The government says this was not necessary since *United States* v. *12 200-Ft. Reels*, —— U.S. ——, 37 L.Ed.2d 500, 507 n. 7, read the new tests into the statute. The government, following the *Hamling* brief and relying on *United States* v. *Thevis* (No. 71-2614, 5th Cir., Sept. 12, 1973), further contends that Miller was, according to the government, a "clarification and modification" of the *Roth* and *Memoirs* standards, and hence there was no unconstitutional impropriety.

If the government is correct, it would certainly render considerable portions of *Miller* superfluous. It completely ignores the concept of prospective law making.

II

Petitioner was indicted and convicted on basis of improper constitutional standards; neither test (b) nor test (c) may be applied retroactively.

A. Vagueness of Statute as Applied and New Miller Test (b).

If the English language has any meaning, what this court said is very plain. *Miller* held, 37 L.Ed.2d at 430, we "*now confine* • • • regulation to works which depict • • •

sexual conduct. That conduct must be *specifically defined* • • • [by statute or as] authoritatively construed." (Emphasis supplied.)

Miller continued, 37 L.Ed.2d at 432-433, "no one will be subject to prosecution • • • unless these materials depict or describe patently offensive 'hard core' sexual conduct *specifically defined*" by statute or authoritative construction. These "specific prerequisites will provide fair notice."

18 USC 1462 obviously does not contain the requisite specificity. In Sians' petition we stated (pp. 12-13) that there is no decision of the Seventh Circuit which pre-*Miller* construed 18 USC 1462 or any other federal obscenity statute to meet the requisite specificity requirements of part (b) of *Miller*, or the prerequisites of fair notice. The government's opposition memorandum does not cite any such case. There is no such case.

Instead, the government contends, citing *Thevis*, that at no point did this court in *Miller*, in what the government calls a "clarification and modification" of the *Roth* and *Memoirs* standards, indicate that the *Roth-Memoirs* standards were unconstitutional. Furthermore, the government urges that the fact that the *Miller*, et al. cases were remanded, instead of being reversed, compels the same conclusion.

In the *past* when *this court* has clarified or modified the *Roth* test, the plurality has *always cited Roth*, and stated it was relying on *Roth*. *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 486-489 (1962), enunciated old part (b) of the prior test—whether material is patently offensive because it affronts contemporary community standards. *Manual Enterprises* cited *Roth*, and stated (370 U.S. at 487) that the *Roth* prurient interest test was but a "compendious way" of stating both tests. The *Memoirs* plurality, 383 U.S. at 418, cited *Roth* and said it relied on *Roth*.

Miller does not cite *Roth* or any opinion or dissent to support *Miller* test (b) or test (c).

The government's position that the *Roth-Memoirs* tests were constitutionally adequate flies in the face of the *Miller* language, quoted above, mandating specificity as "specific prerequisites" of fair notice and any prosecution, and the *Miller* statement (37 L.Ed.2d at 430) that "no member of the court today supports the *Memoirs* formulation." It is contradicted by the *Miller* statement (37 L.Ed.2d at 434) that on June 21, 1973 for the first time since *Roth* a majority had agreed on "*concrete* guidelines" whereby the court can abandon "the *casual* practice of *Redrup* v. *New York*, supra" (emphasis supplied). Casual practices do not give fair notice and do not provide ascertainable standards of guilt. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Herndon* v. *Lowry*, 301 U.S. 242, 263-264 (1937) (conviction vacated, no ascertainable standard of guilt, relying and quoting from *L. Cohen Grocery*); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963) (the standards "of permissible statutory vagueness are strict in the area of free expression"). See, also, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

The government's position would render *Miller* footnote 6 (37 L.Ed.2d at 430 n. 6) and the prerequisite fair notice requirement pointless. Footnote 6 states prior authoritative constructions "may well be adequate" to meet the specificity requirement set forth in the text. This statement and the *Miller* text statement at 432-433 would be meaningless if courts on remand were not directed to look to pre-*Miller* constructions to see whether they were adequate. Adequate for what—to see whether the specificity requirement for fair notice was met and vagueness alleviated. It is the absence of any prior authoritative construction in accord with *Miller* test (b) specificity which rendered the statute too vague as applied to the instant indictment and conviction.

Miller, et al. were not undertaking a review of the statutes and prior decisional law of fifty states and every federal appellate court to see if pre-*Miller* constructions were adequate. We submit that is one clear reason for the remands, namely, to see whether there were in each specific case pre-*Miller* constructions which met the specificity requirements. As stated in Siana' petition, in this case there was none. Hence, the conviction cannot be sustained, unless (which is not permissible) the new tests are applied retroactively.

The analytic approach of most state courts is in accord with our approach. This is true whether state courts have reversed or affirmed convictions. Where state courts have post-*Miller* upheld convictions pre-*Miller,* they have for the most part looked to their particular decisional law pre-*Miller,* or in certain instances to other state statutes pre-*Miller* to determine whether constructions pre-*Miller* meet specificity requirements of part (b).

Since the standards for testing the constitutionality under *Miller* are the same for states and the federal government (*United States* v. *12 200-Ft. Reels,* —— U.S. ——, 37 L.Ed.2d 500, 507 [1973]), it would seem rather preposterous that the approach would be different. In any event, our approach is, we submit, the approach dictated by this court's opinions. It is consistent with all parts of the *Miller,* et al. decisions, including *12 200-Ft. Reels* footnote 7 (37 L.Ed.2d at 507 n. 7) and *Miller* footnote 6.

Test (b) was, we submit, a new test and new formula designed to alleviate and cure vagueness inherent in the statute and prior constructions thereof. Absent prior authoritative constructions in the Seventh Circuit satisfying specificity and fair notice, the conviction cannot be sustained.

In *Detco, Inc.* v. *McCann* (E.D.Wisc., Civ. 72-C-121, Oct. 19, 1973, 3-judge ct.), a three-judge federal court continued

in effect a temporary restraining order restraining the enforcement of the Wisconsin obscenity statute pending resolution by the state court, stating that *Miller* was likely to spell the death knell of the Wisconsin statute. Pertinent to this case is the holding by the unanimous three-judge court with reference to *Miller* test (b):

> "This new formula was designed to provide for standards more concrete and specific than those of the past and to alleviate the problems posed by the void-for-vagueness doctrine and the requirements of notice." (Slip. op. p. 2)

In *United States* v. *Henson* (73-2063, 9th Cir., Oct. 5, 1973) defendant was tried in March/April 1973 and found guilty in April 1973 of violating 18 USC 1462. The Ninth Circuit vacated and remanded in the light of *Miller*, and *also* cited *Stroud* v. *Indiana*, —— Ind. ——, 300 N.E.2d 100 (Ind. Sup. Ct. Aug. 21, 1973), remanded —— U.S. ——, 37 L.Ed.2d 1025 (June 25, 1973) vacating and remanding 273 N.E.2d 842 (Ind. Sup. Ct. 1971). As we stated in our petition (p. 13) the Indiana statute definition of obscenity is identical to 18 USC 1462. The Indiana Supreme Court had prior to *Miller* construed the Indiana statute to incorporate the *Roth-Memoirs test* (273 N.E.2d at 847) so that in *Stroud* the statute and case law paralleled federal Supreme Court decisional law. *Stroud* after remand from this Court held the Indiana statute deficient for failing to set out specifically the proscribed sexual acts, reversed and directed the trial court to discharge the defendant. While *en banc* rehearing in *Henson* has been granted (along with the Miller federal cases), the *Henson* citation of *Stroud* supports our position.

B. Retroactivity.

A new limiting construction, a new definition, a new interpretation of penal statutes, not foreshadowed by prior decisions, designed to cure vagueness, may not be applied

retroactively. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-354 (1964); *Douglas* v. *Buder*, —— U.S. ——, 37 L.Ed. 2d 52, 54-55 (1973); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155, 156 (1969); *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966); See also *Pierce* v. *United States*, 314 U.S. 306, 311 (1941)); *Rabe* v. *Washington*, 405 U.S. 313, 315, 316 (1972).

With reference to part (b), *Miller* said (37 L.Ed.2d at 430) we *"now confine"* obscenity regulation to works that depict sexual conduct specifically defined (emphasis supplied). That is a limiting construction placed on the statute on June 21, 1973.

Miller cited no case and no dissenting opinion in support of or which foreshadowed test part (b) (or part c). There is none in this court. There is none in the Seventh Circuit.

Tests (b) and (c) both enlarge the scope of permissible regulation and simultaneously constitute an unforeshadowed limiting construction designed to cure vagueness. They were unforeseeable constructions of a criminal statute. They may not be applied retroactively to validate the convictions. *Bouie, supra; Shuttlesworth, supra,* 394 U.S. at 156; *Douglas, supra.*

Test (b) and test (c) are also new definitions. The court cannot adopt "a different definition of the offense" to validate the conviction. *Ashton, supra,* 384 U.S. at 198. We also submit that *Rabe, supra,* is applicable, to wit, that petitioner's conviction cannot be affirmed "under a statute with a meaning quite different from the one he was charged with violating". *Rabe, supra,* 405 U.S. at 315.

As stated, in the past when this court has modified or clarified the *Roth* test, the plurality has *always* cited *Roth*, and stated it was relying on *Roth*. *Manual Enterprises, supra,* stated (370 U.S. at 487) that the *Roth* test was but a "compendious way" of stating both the prurient interest

test and the old patent offensive community standards test. The *Memoirs* plurality, 383 U.S. at 418, cited *Roth*, and said the question was whether *Fanny Hill* "satisfies the test of obscenity established in *Roth*". The question here, of course is not whether the *Memoirs* plurality did or did not correctly interpret *Roth;* the plurality relied on it.

The *Miller* majority does not cite *Roth* nor any other case, opinion or dissent to support test (b) or test (c) and none which foreshadowed them.

For certiorari purposes the nationwide importance of the issues here presented is also attested to by the memorandum decision in *United States* v. *Carter* (W.D. Tenn., CR 72-207, Dec. 12, 1973). In *Carter, supra,* the court dismissed the indictment charging violation of 18 USC 1462 and 18 USC 1465 and conspiracy charges involving pre-*Miller* interstate transportation of alleged obscene motion pictures in various parts of the country. The court held essentially that the issue of whether *Miller* might be applied retroactively was of sufficient import that it should be resolved prior to any trial and noted that there were decisions "both ways" on this issue.

C. The "Utterly Without" Test, Vagueness and Retroactivity.

The "utterly without redeeming social value" charge to the jury was based on *Memoirs,* in almost *haec verbae* (Tr. 637-638*). That charge reproduced below and in Appendix F annexed hereto states material is obscene only if "utterly lacking in social value or importance." *Miller,* 37 L.Ed.2d at 431 n. 7, described the "social importance" phrase as an

---

* Finally material is obscene under the federal statute only if it is completely and utterly lacking in social value or importance. If the article has even a small amount of artistic or social value or importance, it is not considered obscene under the law even if its primary appeal is to prurient interest and goes beyond community standards."

"ambiguous concept". An ambiguous concept is not an ascertainable standard of guilt.

But it is not just one footnote. We submit we were entitled to a charge in accord with this court's view and evaluation of the social value test (*Miller*, 37 L.Ed.2d at 429). That should include a statement of the rhetorical question of Mr. Justice White that if persons bought the material, that proved its social worth; that Mr. Justice Harlan wondered if the test had "any meaning at all"; and that this court's majority quoted the foregoing. And the logical conclusion of the foregoing is, we submit, that petitioner was entitled to a charge that if the material amused or entertained in the slightest, it had value. The social value test did not furnish an adequate ascertainable standard of guilt. *United States* v. *Lang*, 361 F.Supp. 380 (C.D. Cal. 1973).

The new serious value test, which is a limiting construction and a new and vastly more restrictive definition, may not be applied retroactively.

III

The exclusion of all testimony for defendant on community standards was due process error.

The government contends that the exclusion of all defendant's proffered evidence of other material openly sold was proper. The government contends this is irrelevant because it would show that others had been selling supposedly "pornographic" material.

We submit that evades the point. The community standards pre or post-*Miller* involves the tolerance level of the relevant community. But this is a changing concept. The community "cannot * * * condemn that which it generally tolerates." *Smith* v. *California*, 361 U.S. 147, 171 (Harlan, J. concurring and dissenting).

If the foregoing has any meaning, then proof of what is *openly* sold and *openly* exhibited is *some* evidence of the community level of tolerance. On the government's view, a defendant would have to first prove that a court decision, and presumably an appellate decision, has held various items not obscene before any evidence of community standards is offered. This emasculates the basic premise. Community tolerance levels are not measured just by appellate court rulings.

The government has also failed to comment on the trial court's highly prejudicial comment in the presence of the jury concerning the proffered evidence.

It was a violation of due process to rebuff every effort by defendant to offer community standards proof.

IV

The indictment and conviction predicated on national standards furnished no ascertainable standard of guilt.

The indictment was returned and the prosecution and the conviction obtained under a statute which had no ascertainable standard of guilt for the critical factor of the relevant community standards under old tests or *Miller* tests (a) and (b).

The government contends that the application "of a national, rather than a state standard" is not improper, and cites *United States* v. *Marvin Miller* (71-1850, 9th Cir., Aug. 31, 1973). But *Miller* held (37 L.Ed.2d at 435) that national standards were "hypothetical and unascertainable," and that determination of national standards was an exercise in futility and, as stated, that the standards for testing the constitutionality of state statutes under *Miller* are "applicable to federal legislation" (*12 200-Ft. Reels,* 37 L.Ed.2d at 507). But if determination of na-

tional standards is an exercise in futility in a state case, it is equally an exercise in futility in a federal prosecution.

In this federal case the charge to the jury was predicated on the *Roth-Memoirs* test. *Manual Enterprises, supra* (370 U.S. at 488) held that in a federal prosecution the standards were national. *Manual Enterprises* also held (370 U.S. at 488) that there "*must* first be decided the relevant community." The charge in this case of course was given against the law as it existed. But *Miller* clearly held that a national standard was and is not an ascertainable standard.

The conflicts in the decisions are already clear.

On December 11, 1973 the Tenth Circuit in *United States* v. *Friedman* (Nos. 72-1143-44, 10th Cir., Dec. 11, 1973) vacated the 1971 convictions of Friedman, et al, and remanded to the district court for a new trial in the light of *Miller,* et al. Here germane, the Tenth Circuit held (sl. op. p. 3):

> "A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing, —— F.2d —— (Tenth Circuit, No. 638-70), opinion after remand to this court."

As stated, the government cites *United States* v. *Thevis* for the proposition that the *Miller,* et al. decisions were allegedly a clarification and modification of the *Roth-Memoirs* standards. But *Thevis* also stated (slip op. p. 9) that *Miller* held "community standards" does *not* refer to a nationwide community.

As stated in *United States* v. *Carter, supra,* the district court in Tennessee dismissed the indictment. The Tennessee District Court also held there should be a resolution before trial on the issues raised by defendant that there

cannot be a national standard and hence there was no ascertainable standard of guilt.

It should also be noted that despite the Ninth Circuit August 31, 1973 *Miller* case and the First Circuit opinion in *United States* v. *One Reel of Film*, 481 F.2d 206 (1st Cir. July 1973), various federal obscenity trials are proceeding on the basis that the relevant community is a local community. In these cases the local community is measured by the judicial district.

The ascertainment and knowledge of the *relevant community* is the *sina qua non* for establishing ascertainable standards in the community standard application of the tests for any indictment or conviction pre-*Miller* or post-*Miller*. *Manual Enterprises, supra,* 370 U.S. at 488 (there *"must first be decided the relevant community"*).

Defendant was indicted and convicted in the federal prosecution on the basis of a national standard. The charge was given in this case on the basis of federal law as it then existed.

The government says no objection was taken to the charge. But this federal case was tried on the basis of federal law, including *Manual Enterprises*. Unlike *Miller*, 37 L.Ed2d at 435, the parties in this case did not proceed on the basis of state or local standards, and the trial court did not intimate that a local or state standard was the relevant community standard. Hence, there would be no reason for objecting to the charge.

The government says that applying statewide community standards as opposed to national standards has nothing to do with state law. The Sians' petition had made this point to emphasize this as an additional reason why there was no ascertainable standard in a federal prosecution both under the old law involving the Sians' indictment and conviction and parts (a) and (b) of the new *Miller* tests.

Now, obviously, a community tolerance level is a fact issue for a jury and the *Miller* state case so held. But this fact issue of community tolerance is not divorced from and totally unrelated to all local law on the subject. The local tolerance will turn in some measure on legislative enactments or state or local decisions. It is for this additional reason that we urged that in federal prosecutions the relevant community had to be local. It is in this sense that the relevant standards must turn on local law.* Otherwise, the entire objective of fair notice and guidance is being defeated.

If a shipper ships paperbacks or whatever from State A to State E, then that shipper should be able to look to the laws of State E, the place of distribution.

That shipper should not have to be concerned with a federal prosecution based on some abstract notions of average person offensiveness for every State between State A and State E.**

We submit that as a matter of constitutional law that in a federal prosecution the relevant community must be a local community.

In any event national standards did not and do not furnish an ascertainable standard of guilt.

While there are prior dissents which in a way foreshadowed "a local community" standards test, *Jacobellis* v. *Ohio, supra,* 378 U.S. 184, 200 (1964), was a *state* case, not a federal prosecution. The cases such as *Hoyt* v. *Minnesota,* 399 U.S. 524, 525 (1970), cited by *Miller,* 37 L.Ed.2d at 435-436, all involved state cases. While reliance

---

* Congressional Bill S-1 93rd Congress so provided. It was never acted on. We also urged that making the local community the relevant community was a matter for Congress.

** Shipper should also know that he will be judged by the community tolerance level of the judicial district where the material is disseminated.

is not a factor, these dissents were in state cases. They do not furnish the basis for foreshadowing of a change in a federal prosecution. This new *Miller* rule may not be applied retroactively.

National standards did not furnish an ascertainable standard of guilt. The indictment and conviction may not stand.

CONCLUSION

For the foregoing reasons petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

RALPH J. SCHWARZ, JR.
22 East 40th Street
New York, N. Y. 10016
212—MU 6-8160

JOHN POWERS CROWLEY
CROWLEY, NASH AND SHEA
53 West Jackson Boulevard
Chicago, Ill. 60604
312-922-8980

Attorneys for Petitioner

APPENDIX F

Obscenity Tests Charge to Jury

(Tr. 636-638)

Charge

The statute includes, as I have just indicated, the words "obscene, lewd, lacivious, indecent and filthy." Those words refer to matters that deal with sex in a manner such that the predominant appeal is to prurient interests. An article is obscene within the meaning of the statute only if, when taken as a whole and not part by part, it appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex as established by the current standards of the community as a whole.

Furthermore, matter is not obscene under the statute unless it is utterly lacking in redeeming social value or importance. This definition of obscenity within the meaning of the statute is composed of a number of elements or factors. First you must ascertain the predominant theme of the matter taken as a whole. An item is not obscene merely because a part of it appeals to prurient interest. Such appeal must be the predominant theme of the article. Second, the appeal to prurient interest must be determined in relation to the intended and probable recipients of the material. Such appeal may be to average persons in the community or it may be to a deviant sexual group. What that means is that in evaluating the material to determine whether it is obscene, you as jurors should not judge it by how it affects you individually but how it would affect or appeal to the intended or probable recipients. Third, an item is not obscene simply because it deals with or portrays sex. Matter appeals to prurient interest if it deals with sex in a morbid way and goes substantially beyond the contemporary stands of the entire community.

Thus, you may not find that an item is obscene material merely because it deals with sex in a manner that would be offensive to some people or to certain groups. The material must be judged by the standards of the community as a whole. In determining contemporary community standards, you may consider what, as shown by the evidence admitted during the trial, appears in contemporary magazines, books, newspapers, television programs, motion pictures and other media of communication which are freely available in the community as a whole.

Finally, material is obscene under the federal statute only if it is completely and utterly lacking in social value or importance. If the article has even a small amount of artistic or social value or importance, it is not considered obscene under the law even if its primary appeal is to prurient interest and goes beyond community standards.